

DE 00-009

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY  
CORPORATION, NORTH ATLANTIC ENERGY SERVICE CORPORATION, NORTHEAST  
UTILITIES AND CONSOLIDATED EDISON, INC.

Joint Petition for Approval of Merger

Order Denying Motion to Bifurcate

O R D E R    N O. 23,551

September 11, 2000

On January 18, 2000, Public Service Company of New Hampshire (PSNH), North Atlantic Energy Corporation (NAEC), North Atlantic Energy Service Corporation (NAESCO), Northeast Utilities (NU) and Consolidated Edison, Inc. (CEI) (together, Joint Petitioners) filed with the New Hampshire Public Utilities Commission (Commission) a petition seeking the Commission's approval of the proposed acquisition of NU by CEI, based in New York.

The Commission issued an Order of Notice on March 7, 2000, scheduling a pre-hearing conference for March 16, 2000 and as a result of that pre-hearing conference issued Order No. 23,423 on March 27, 2000, approving a procedural schedule and petitions to intervene from the Save Our Homes Organization (SOHO), the Governor's Office of Energy and Community Services (GOECS) and the Seacoast Anti-Pollution League (SAPL) and noting the appearance of the Office of Consumer Advocate (OCA) on behalf of residential ratepayers.

Subsequent petitions for intervention submitted by Rep. Jeb E. Bradley, the Campaign for Ratepayers Rights (CRR) and the Business and Industry Association (BIA) were approved by the Commission. On May 3, 2000, the Commission notified the parties that it had requested Morrison & Hecker, LLP to retain the consulting services of Mr. Richard LaCapra of LaCapra Associates and that they would be designated as Staff Advocates along with Attorney John McCaffrey of Morrison & Hecker as counsel to LaCapra Associates.

On June 27, 2000, the Commission Staff (hereinafter the Settling Staff) submitted a Settlement Agreement (Settlement) which it had entered into with PSNH, NAEC, NAESCO, NU and CEI.

On July 10, 12, 13, 17, 18, and 19, the Commission held hearings in this docket. Initial Briefs were submitted on August 11, 2000 and Reply Briefs on August 18, 2000.

On August 23, GOECS filed a Motion to Bifurcate (the Motion) on behalf of itself and Rep. Bradley, the OCA, SOHO, and the BIA. In the Motion GOECS stated that they had "reluctantly concluded that it is necessary to bifurcate Settling Staff in order to preserve the public perception of openness, fairness and impartiality in the Commission's decision-making process." They went on to say that "the

positions advocated by Settling Staff in their legal briefs make it clear that the basic prerequisites of RSA 363:32(a) [sic] have been met."

On August 24 ,2000, Gary Epler, the Commission's General Counsel, sent a letter to the parties requesting that responses to the Motion be filed by 4:30 PM on Monday, August 28, 2000. Also on August 24, 2000, Attorney Donald Kreis, representing the Settling Staff, filed a response to the Motion in which he indicated that he, Mr. Kreis, was the author of the briefs and to the extent that the briefs reflect a highly adversarial position that could be perceived as inconsistent with the ability to render fair and neutral advice, the responsibility was his and he deeply regretted that the briefs may have "given the erroneous impression that [he] would be unable to assist the Commission in resolving the case in the exercise of the commissioners' best objective judgment."

GOECS, on behalf of the same parties who filed the Motion originally, filed a letter on August 28, 2000 in response to Mr. Kreis' letter in which it indicated the importance of the appearance of fairness, objectivity and impartiality, and went on to state that it was confident that the Commission could make the appropriate judgment as to which

individuals should be designated as decisional and which as advocates. On August 28, 2000, CEI and NU filed an Objection of the Joint Petitioners to the Motion to Bifurcate. In support of their Objection, the joint petitioners said that the Commission had previously dealt with the issue of staff designation on the record in the proceeding, that the parties supporting the Motion had acted too late in the proceeding to raise these issues, and that granting the Motion in this case would create a negative incentive for settlement in future cases.

Our decision on this matter must be governed by the provisions of RSA 363:30 *et seq.*, the statutes which concern the participation of Staff in adjudicative proceedings, and in particular by RSA 363:32, I(a), the statute cited by the Motion, which provides parties with an opportunity to request the designation of Staff members as staff advocates and requires the Commission to so designate staff members when certain standards are met. In relevant part this statute provides as follows:

I. (a)....the commission shall designate members of its staff as staff advocates and decisional employees, if requested by a party with full rights of participation in the proceeding, when:

(1) It appears that staff members have committed or are likely to commit to a highly adversarial position in the

proceeding and may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding;

(2) The docket concerns an issue or matter which is particularly contentious or controversial and which is significant in consequence;

(3) The issues in the docket are so contested as to create reasonable concern on the part of any party about the staff's role in commission decision making. ...

- (c) Although any party who is a full intervenor may make a motion to designate pursuant to paragraph I at any point during the proceeding, if the motion is made later than 20 days after staff members have filed testimony, the commission may deny the motion solely on the grounds that it is administratively unworkable because such motion has been filed so late in the proceeding.

GOECS correctly pointed out in its Motion that the Commission has the authority to deny such a motion at this point in the proceeding because it is "administratively unworkable." Pursuant to RSA 363:32, I(c), we hereby deny the motion as administratively unworkable at this late point in the proceeding. With the limited staff that we have available to address the number of important dockets that are pending before us at this time, and the commitment of staff to other projects, it would be administratively unworkable to substitute other staff in this case, after the record is closed and all briefs have been filed. If the staff members who are the subject of the Motion were not available to us to

assist in reviewing exhibits and transcripts, evaluating issues and policy arguments, and preparing initial drafts of our order, we believe that this would cause an inordinate delay in the proceeding.

The bifurcation statute appears to have two overriding purposes: first, to ensure to the extent administratively workable that staff advising the Commission provide fair and neutral advice to the Commission on all positions advanced in the proceeding, and second, to ensure, particularly where the issue or matter is particularly contentious or controversial and significant in consequence, that participation by a staff person with a particular point of view not create "reasonable concern on the part of any party about the staff's role in commission decision making." RSA 363:32, I(a)(3). Concern of a party may be raised when, in the words of the statute, staff have committed to "highly adversarial position in the proceeding." RSA 363:32, I(a)(1).

The moving parties, without providing specific citations to statements in the evidence or the briefs,<sup>1</sup> state that their concern has to do with the positions taken by the

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The motions lack of factual or legal specificity is another reason to deny it. See Rule Puc 203.03(d)(1).

Settling Staff. Here the staff members who filed testimony and submitted briefs committed to positions in the proceeding in support of the Settlement they had negotiated with the Company and to some degree and on some issues the positions were adverse to those of the Intervenor. Moreover, some of the written and verbal testimony specifically and vigorously opposed certain positions taken by various Intervenor, and the Settling Staff briefs strongly and pointedly argued in favor of the Settlement and in opposition to Intervenor's proposals.

At the hearings in this case, OCA brought up the issue of bifurcation of the Staff, and the Settling Staff witnesses were each asked to declare whether they were able to neutrally and impartially advise the Commission in this matter. Each Settling Staff witness so affirmed. Transcript Day VI, p. 149. At this point, the Settling Staff witnesses had already publicly stated their positions in favor of the settlement, and, at least implicitly, in opposition to the positions of various intervenors. Neither the OCA nor any other party sought to have Settling Staff bifurcated at this point. Accordingly, we cannot conclude that the instant Motion is based on the mere difference in position between Settling Staff witnesses and the Intervenor.

Similarly, to the extent that the concern about the ability of Settling Staff to advise the Commission in this case arises from the post-hearing proceedings, *i.e.* the briefs, the concern can only be one of tone of argumentation, since the content of the Settling Staff's brief and reply brief are wholly consistent with the positions taken earlier in the proceeding by Settling Staff witnesses. In a letter dated August 24, 2000, the author of the briefs, Mr. Kreis, has asked the Commission not to hold the tone of his filings against his colleagues on the Settling Staff team, as they did not choose the wording. For his own part, he has stated that he deeply regretted the impression his choice of words may have left. He went on to affirm that, notwithstanding the tone of the reply brief, he would be able to assist the Commission in resolving the case in the exercise of the Commissioners' best objective judgment.

With respect to the Settling Staff witnesses, nothing has changed since the hearings in this docket to justify invoking RSA 363:30 *et seq.* at this point. With respect to the staff attorney, his August 24, 2000 letter provides assurance that any heightened adversarial tone in the briefs was no more than zealous advocacy on his part and does not represent a fixed attitude that would prevent the staff



attorney from fulfilling his responsibilities in fairly and neutrally advising the Commission in the deliberations and drafting process. We take Mr. Kreis' response to the Motion to be a confirmation that he respects the validity of facts adduced in this case that do not tend to support the Settling Staff's point of view, and that he fully respects the perspective of the Intervenors whose positions are different from those put forward by the Settling Staff.

We weigh these facts in the balance when considering whether, at this late point in the process, to bifurcate staff and make their services unavailable to us for completion of these proceedings. Granting this motion will not in any way affect the result in this docket, other than to delay the result. We cannot in good conscience allow such a delay and consequent prejudice to the due process rights of the Joint Petitioners to a timely decision.

GOECS states in its Motion that "it is necessary to bifurcate Settling Staff in order to preserve the public perception of openness, fairness and impartiality in the Commission's decision-making process." We too are concerned about public perception and confidence in our decisionmaking process. That is one of the reasons that we so often require our Staff to put on the record their independent analyses of

issues in the dockets that come before us, through prefiled testimony, subject to cross-examination. These analyses in effect constitute the advice that they would give us in their advisory capacity. It is reasonable to expect that the essential advice that Settling Staff would provide to us in this docket is already in the record.

The moving parties, in expressing their confidence that the Commission could make the appropriate judgment as to their motion for designation, have indicated their understanding that in making our decision, we will carefully weigh the competing considerations embodied in RSA 363:30 *et seq.*, to ensure essential fairness while preserving our ability to conclude the proceedings before us in a timely manner. The Commissioners sat on the hearings in this case, and we have personally heard the evidence. We will personally consider all of the evidence and the briefs. As is our obligation and our practice, our decision in this case will be based on the record before us and it will not be subject to any undue influence by the Settling Staff. These assurances must, in this case, outweigh any concern raised here about the adversarial nature of Settling Staff positions in support of the proposed Settlement Agreement. For this reason, and the other reasons stated above, we deny the Motion.

**Based on the foregoing, it is hereby**

**ORDERED,** that the Motion to Bifurcate dated August 23, 2000 is DENIED.

By order of the Public Utilities Commission of New Hampshire this eleventh day of September, 2000.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary